

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGIN
FILE

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations

Havelock, North Carolina
Hertford, North Carolina
Surfside Beach, South Carolina
Johnsonville, South Carolina
Scranton, South Carolina
Georgetown, South Carolina
Stallsville, South Carolina
Jacksonville, North Carolina
Fair Bluff, North Carolina
Wilmington, North Carolina
North Myrtle Beach, South Carolina
St. Stephen, South Carolina
Loris, South Carolina
Darlington, South Carolina
Shallotte, North Carolina
Murells Inlet, South Carolina
Longwood, North Carolina
Carolina Beach, North Carolina
Kure Beach, North Carolina
Bucksport, South Carolina
Fairmont, North Carolina
Andrews, South Carolina
Charleston, South Carolina
Elloree, South Carolina
Little River, South Carolina

MM Docket Nos. 89-326
89-327
90-32

RM 7926
Treated As A Petition for Rulemaking

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APR 13 1990

Federal Communications Commission
Office of the Secretary

RM-5138
RM-6315
RM-6448
RM-6765
RM-6779
RM-6782
RM-6836
RM-6840
RM-6954
RM-7051
RM-7077
RM-7200
RM-7304
RM-7305
RM-7306
RM-7307
RM-7308

To: Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY COMMENTS

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SUMMARY

Longwood Broadcasting is interested in providing local service to Longwood, North Carolina. Recently the original petitioner for Longwood withdrew its expression of interest. Longwood Broadcasting's interest should be recognized at this stage of the proceeding for three reasons. First, there are various allotment scenarios which will permit the allotment of either Channel 235A or Channel 237A to Longwood on a non-comparative basis, that is, not affecting any other proposal. Second, this reply pleading is timely filed with respect to the Commission's invitation to submit any responsive pleading within 30 days of the Public Notice in MM Dockets 89-326 and 89-327 which announced pending mutually exclusive proposals. The pleading is also a timely filed reply in MM Docket 90-32. Third, the Commission's policy which refuses to accept expressions of interest filed after the initial comment period is inconsistent with Section 73.3525 of the Commission's Rules and Section 307(b) of the Communications Act of 1934, as amended, and therefore must be changed to permit consideration of this filing.

As for Longwood's community status, the record demonstrates sufficient community indicia to permit a finding of community status based on recent Commission case law on this subject. Finally, on a comparative basis, the Commission's allocation priorities favor a first local service to Longwood

over either of the conflicting proposals to upgrade an FM station at Shallotte, North Carolina or at North Myrtle Beach, South Carolina. With regard to a recently filed conflicting proposal for a first local service at Little River, South Carolina, Longwood Broadcasting will file a pleading comparing these communities should the Commission accept the Little River proposal by Public Notice. Accordingly, the Commission should allocate either Channel 235A or 237A to Longwood, North Carolina, as its first local service.

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Little River, South Carolina)	
To: Acting Chief, Allocations Branch		
Policy and Rules Division		
Mass Media Bureau		

REPLY COMMENTS

Longwood Broadcasting, by its counsel, hereby submits its reply comments directed to the (1) "Comments and Counter-proposal of Fogel Media, Inc."; (2) "Comments and Counter-proposal of Pro-Media, Inc." filed in MM Docket 90-32 and (3)

the "Withdrawal of Petition for Rule Making and Expression of Interest" filed by Great Southern Media in MM Docket 89-327. These two docketed proceedings are interrelated along with MM Docket 89-326 due to certain alternative channel allotment proposals that have been offered for the various communities involved. Longwood Broadcasting has not participated in any of these docketed proceedings prior to this time. It offers its reply comments as a consequence of the withdrawal of Great Southern Media's ("GSM") expression of interest in the allotment of a first FM channel to Longwood, North Carolina. GSM first filed its petition on May 19, 1989, and had reaffirmed its continuing interest in the Longwood proposal until March 29, 1990, just two weeks ago. Longwood Broadcasting is interested in applying for either of the FM channels (235A or 237A) which have been offered in the various filings as alternative proposals for a first local service to Longwood. For the reasons stated herein, Longwood Broadcasting's interest should be recognized and accommodated. In support hereof, the following is shown:

1. There are three reasons why Longwood Broadcasting's participation at this stage should be permitted in support of a first local FM channel allotment to Longwood, North Carolina. In addition, Longwood Broadcasting will offer its comments regarding the evidence which has already been entered into the record in MM Dkt. 89-327 to demonstrate that

the attributes of Longwood satisfy the Commission's criteria for community status. Finally, as to the merits, Longwood Broadcasting will address the various alternatives presented in MM Dkts. 89-326 and 89-327 in response to the Commission's invitation to do so in MM Dkt. 84-231, Memorandum Opinion and Order, 5 FCC Rcd 931 (1990), at fn. 12. As to the most recent proposal of Pro-Media, Inc. and Fogel Media, Inc. in MM Dkt. 90-32, Longwood Broadcasting reserves the right to address the relative merits of that proposal as it pertains to Longwood in a subsequent responsive pleading should the Commission issue a Public Notice announcing acceptance of that proposal with the opportunity for reply comments.

I. PROCEDURAL MATTERS

A. COMMISSION POLICY PERMITS EXPRESSIONS OF INTEREST IN REPLY COMMENTS WHEN NO PREJUDICE TO OTHER PARTIES IS PRESENT

2. The Commission's general policy has been to adhere to procedural deadlines in contested proceedings. See Santa Isabel, Puerto Rico, 51 FR 6119 (1986), recon. denied, 2 FCC Rcd. 3454 (1987), review denied, 3 FCC Rcd. 2336 (1988), recon. denied 66 RR 2d 804 (1989). However, the Commission routinely grants exceptions to this policy when to do so would not adversely impact other pending proposals. See, e.g., Chubbuck, Idaho, 5 FCC Rcd 573 (1990); Weston and Webster Springs, West Virginia, 5 FCC Rcd 1006 (1990); and Coos Bay,

Oregon, 5 FCC Rcd 999 (1990). These cited cases are just the most recent examples of this policy.

3. The original petition filed by Great Southern Media to allot Channel 235A to Longwood was the subject of the Notice of Proposed Rule Making in MM Dkt. 89-327, 4 FCC Rcd 5987 (1989). Jennings Communications Corporation ("Jennings") filed a counterproposal in Dkts. 89-326 and 89-327 seeking the substitution of Channel 233C3 for 238A at Shallotte, North Carolina, with additional channel substitutions. As an alternative, Channel 237A was proposed for allotment to Longwood. Thus Channel 237A is identified as a channel available for allotment to Longwood which can be adopted consistent with Jennings proposal and is therefore unaffected by the expression of an interest in Longwood at this stage. Should the Jennings proposal be denied for some reason unrelated to the Longwood proposal, Channel 235A could still be allotted as a first local service in response to the interest offered herein.

4. Similarly, the proposal of Ogden Broadcasting of South Carolina, Inc. for an upgrade at North Myrtle Beach, South Carolina which requires, inter alia, the substitution of Channel 235A for 290A at Loris, South Carolina, and which conflicts with the allotment of Channel 235A to Longwood, is consistent with the allotment of Channel 237A to Longwood. If the North Myrtle Beach proposal is denied or the Commission otherwise resolves

the conflict, then Channel 235A could be allotted to Longwood. In either event, Longwood Broadcasting's expression of interest can be recognized without prejudice to any other party.

5. Finally, in MM Dkt. 90-32, the counterproposal of Pro Media, Inc. seeking an upgrade of its FM station at Fairmont, North Carolina suggests an alternate channel for a new allotment to Little River, South Carolina. The alternate channel, 237A, directly conflicts with the alternate channel offered in Dockets 89-326 and 89-327 for Longwood, North Carolina. As indicated before, Longwood Broadcasting will address this proposal on the merits if it is accepted and placed on a Public Notice. Nevertheless, should the alternate channel for Little River be denied, Channel 237A could be allotted to Longwood.

B. ADDITIONAL COMMENTS WERE INVITED BY THE COMMISSION IN THE MEMORANDUM OPINION AND ORDER IN MM DKT. 84-231.

6. In the Memorandum Opinion and Order in MM Dkt. 84-231, 5 FCC Rcd 931 (1990) at footnote 12, the Commission expressly invited comments to the various proposals set forth in MM Dkts. 89-325 and 89-327, in effect reopening the two dockets for all filings --

"The staff's Public Notice normally establishes a fifteen day period in which parties may file pleadings addressing the counterproposals. We see no reason to depart from this timing. However, due to the

complexity of this proceeding, we direct the staff to liberally accept any pleadings responsive to the pleadings filed during the initial fifteen day period if those responsive pleadings are filed within 30 days after the date of the staff's Public Notice."

The staff's Public Notice was issued on March 14, 1990, Report No. 1809. Therefore these reply comments (filed April 13, 1990) are timely filed as a responsive pleading in Dockets 89-326 and 89-327.

C. THE COMMISSION'S POLICY REFUSING TO ACCEPT LATE EXPRESSIONS OF INTEREST AFTER THE ORIGINAL PARTY WITHDRAWS IS INCONSISTENT WITH SECTION 73.3525 OF THE COMMISSION'S RULES AND SECTION 307(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED.

7. Section 73.3525 (b)(1) states as follows:

(b) Whenever two or more conflicting applications for construction permits of broadcast stations pending before the FCC involve a determination of fair, efficient and equitable distribution of service pursuant to section 307(b) of the Communications Act, and an agreement is made to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to § 73.3568) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section.

(1) If upon examination of the proposed agreement the FCC finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities, then the FCC shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.

8. Thus, where the Commission has under consideration a Section 307(b) comparison between two communities in a comparative hearing, and one party's request is dismissed, the Commission believes that its Section 307(b) mandate is important enough that the community should not be deprived of the local service for failure of the party to prosecute. Rather, the Commission requires publication of the withdrawal to provide the opportunity for someone else to take the place of the dismissing party in order to provide the more deserving community with a new local service. In Mobile Broadcasting Service, Inc., 52 RR 2d 670 (1982), the Commission explained the rationale for this approach as follows:

"[The rule] suspends the operation of the 'cut-off' rules, thus enabling the Commission to accept additional applications for the facilities sought to be withdrawn. Should another application be filed, the Commission can evaluate the relative needs of the communities concerned, instead of having the 307(b) issue precluded by an agreement between the applicants which results in the withdrawal of one applicant with no opportunity for other interested persons to apply for the same facilities.

The necessity to make this opportunity available is particularly pressing when a 307(b) issue is presented, for the grant of the remaining application may totally preclude the establishment of facilities in the community which the withdrawing applicant has sought to serve. Although it is not uncommon for the grant of broadcast facilities (particularly for standard broadcast stations) to preclude the establishment of further service in other communities, and though much of the distribution of facilities has thus been made on a random demand basis, the situation with which we are here concerned is different. For the proposed rule is not directed to the situation where there is but one application before us, but touches only those cases wherein there has been demand for broadcast facilities in a particular community,

expressed in an application, and where that application is then proposed to be withdrawn via an agreement between competing parties. In these circumstances, we make the considered judgment that our statutory responsibility under Section 307(b) will be met and the public interest best served by protecting the broadcasting needs of particular communities for which broadcast facilities have been proposed, and then withdrawn, by providing, by Rule, for further opportunity where appropriate for other persons to apply for the facilities sought to be withdrawn.

"The additional time which would be allowed for filing further applications under the rule (two weeks for publication plus 30 days), plus the added delay necessitated by a hearing should further applications be filed, has been criticized by commenting parties as unfairly adding to the time that a party must wait before his application can be acted on by the Commission, and which time would be eliminated if agreements were approved and the rule not in effect... Our considered judgment is that in all cases where 307(b) issues arise our responsibility under that section can best be discharged through adoption of the rule... While the prompt disposal of all matters before us is desired, speed as a goal in the administrative process cannot be pursued irrespective of the results achieved."

Dismissal of Applications by Agreement (Docket No. 13913), 20 RR 1673-1675 (1961). See also Renman Broadcasting, Inc., 50 RR 2d 864 (1981); Cornwall Broadcasting Corp., 47 RR 2d 865 (1980); Tal-Flo Broadcasting, Inc., 46 RR 2d 949 (1979).

9. The same Section 307(b) considerations come into play in the allocation context where two conflicting proposals are made for a channel. The Commission's policy of not permitting late expressions of interest in such contested rulemaking proceedings is inconsistent with the clear dictates of Section 73.3525 of the Commission's Rules and Section 307(b) of the Communications Act. In order to protect the Commission's

mandate to provide a first local service to Longwood, North Carolina, this filing must be accepted for consideration.

II. COMMUNITY STATUS

10. The question of community status has been addressed in the initial comments of Great Southern Media ("GSM") in this proceeding. GSM indicated that Longwood is listed in the 1989 Rand McNally Commercial Atlas as having 250 persons based on the 1980 U.S. Census,^{1/} and shown on the map of North Carolina in the 1989 Rand McNally Road Atlas. Longwood has its own post office and zip code (28452). In addition, the community has its own churches and business establishments. GSM indicated that Longwood predominantly relies on agriculture and timber for its economic base. Furthermore, the history of Longwood was documented in an article published in the Coastal Courier, attached to GSM's comments. The article leaves no doubt of Longwood's longstanding community status dating back to pre-Civil War days. In Exhibit 1, Longwood Broadcasting supplements the record by providing pictures of road signs, businesses and other institutions in Longwood. See Exhibit 1.

11. The Commission has previously allocated FM channels to communities of similar stature. Recently in the

^{1/} In its reply comments, GSM proffered updated population figures for Brunswick County and estimated Longwood's 1989 population to exceed 750 persons.

Memorandum Opinion and Order ("MO+O") in Docket 84-231, 5 FCC Rcd 934 (1990), the Commission affirmed the allotment of a first FM channel to Semora, North Carolina. Semora's estimated population from the Rand McNally Commercial Atlas was 150 persons. Semora has a post office, fire department, two churches and business activity (several stores, two restaurants and a night club). The Commission's reasoning for finding Semora to be a community is very similar to the analysis applicable to Longwood's attributes:

While the amount of commercial activity in the town is limited, the Commission has never established a minimum amount of commercial activity necessary to qualify an area as a community. Furthermore, the fact that persons from outside of Semora may participate in commercial activities in the community does not foreclose a finding of community status, but instead serves as evidence that persons from surrounding areas view Semora as a center of business activities for a surrounding area. Each of the above factors in isolation would not necessarily make an area a community. However, when viewed together, the factors are strong evidence of the existence of a community.

Semora has no local government and provides no municipal services except for its volunteer fire department. Residents rely on the county to provide police and schools. This arrangement does not preclude finding that Semora constitutes a community. There could be any number of reasons as to why such services are provided on a county-wide as opposed to a local basis. Semora is a small community and the population may not be able to maintain an effective local police force and school district. We do not believe, however, that we should find that no community exists simply because the community is small. Moreover, the Commission does not require a municipality to provide every public service on its own in order to merit community status. Similarly, the absence of a newspaper or a bank is not fatal to community status.

Memorandum Opinion and Order at 935.

12. Accordingly, based on the Commission's standards for community status, Longwood's demonstrated attributes qualify it for a first local service. Further, Longwood's priority would entitle it to obtain Channel 235A versus an upgrade at Shallotte or North Myrtle Beach. Since Longwood Broadcasting has shown that its interest in applying for a first local FM channel for Longwood must be recognized, it urges adoption of Channel 235A or 237A to Longwood, North Carolina.

III. COMPARATIVE ANALYSIS

13. The necessity for consideration of the Longwood proposal is manifest. On a comparative basis, a first FM channel allotment is clearly preferred over a request for an upgrade either at Shallotte (Channel 233C3) or at North Myrtle Beach (which requires the allotment of a conflicting channel at Loris). Regardless of how small Longwood's population may be, if the Commission finds that Longwood is a community under § 307(b) of the Communications Act of 1934, as amended, the allocation priorities will favor a first local service (Priority 3) over either of the two upgrade proposals (Priority 4). See, Revision of FM Assignment Policies and Procedures, supra. The Commission has held that the concept of "quiet village" is inapplicable to a comparison of a new allotment versus an

upgrade. See, Chauncey, Georgia, et al., 4 FCC Rcd 6876(1986) and Bloomington and Nashville, Indiana, 4 FCC Rcd 5965 (1989). The reason for this clear preference of first local service is that the upgrades provide only an increase in secondary coverage area with no local service obligation (unless the gain areas are unserved or underserved). The public interest is better served by the primary service obligations attendant to a first transmission service to a community.^{2/}

14. Accordingly, the allotment of Channel 235A should be granted to Longwood as a first local service. Longwood Broadcasting would accept the allotment of Channel 237A as an alternative. As indicated earlier, the respective merits of allotting Channel 237A to Longwood versus Little River in order to accommodate the Fairmont upgrade, will be addressed in a reply pleading should the Fairmont proposal be placed on Public Notice.

^{2/} The Commission traditionally has held that the "quiet village" doctrine only applies when the larger competing community has shown a far greater public interest need for a first competitive local service than the smaller community has shown for a first local service. See, e.g., Debra D. Carrigan, 100 FCC 2d 721, 731-2 (1985); Chauncey, Georgia, supra.

Respectfully submitted,

LONGWOOD BROADCASTING

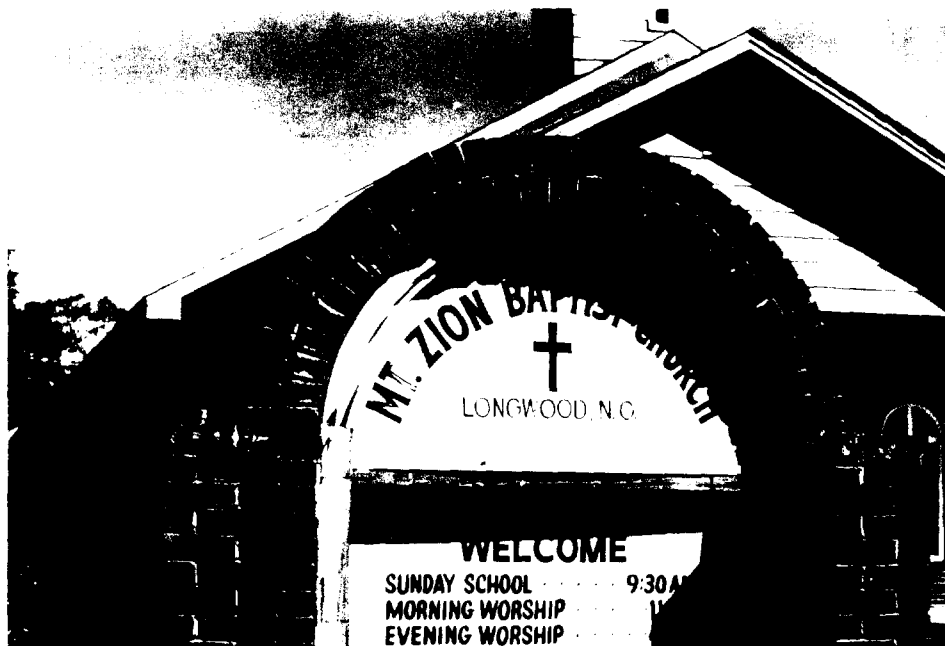
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April 13, 1990

EXHIBIT 1



Restricted Homesites

100' X 200' & UP

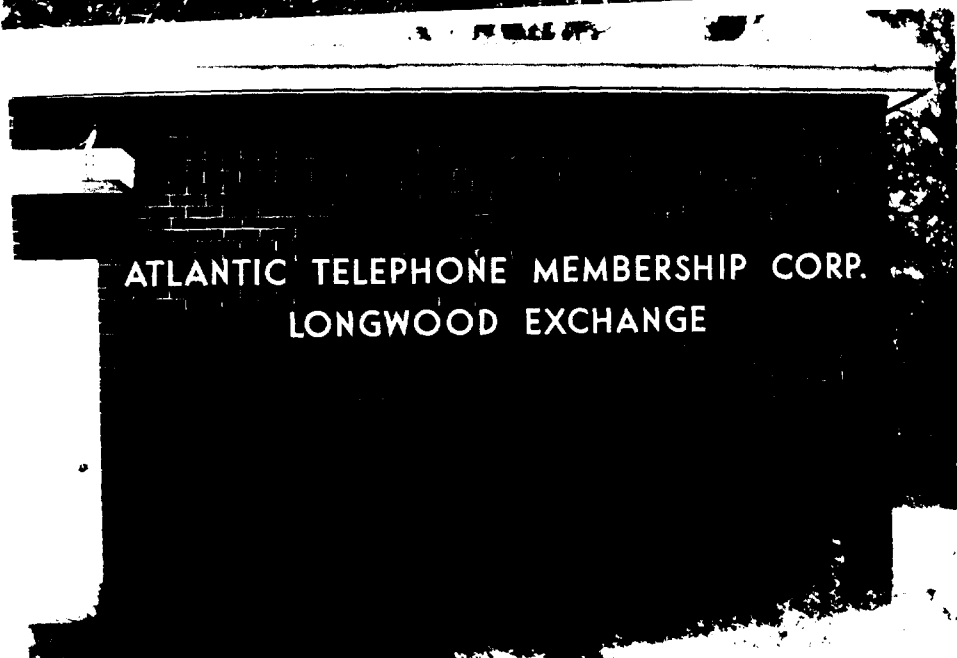
PHASE I
CONVENTIONAL HOMES

PHASE II
MANUFACTURED HOMES

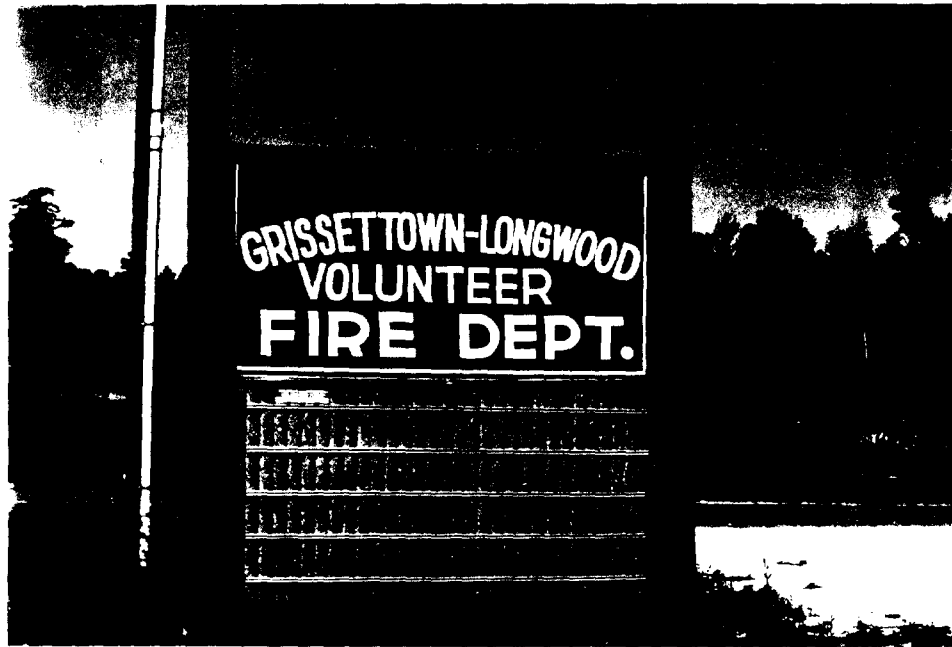
OFFICE LOCATED - 1 MILE WEST ON 904

LONGWOOD Baptist Church

SUNDAY SCHOOL - 10:00 AM WORSHIP SERVICE 1st & 3rd SUN.
WELCOME... PASTOR REV. BARRY LONG



ATLANTIC TELEPHONE MEMBERSHIP CORP.
LONGWOOD EXCHANGE



CERTIFICATE OF SERVICE

I, Ivan Davila, a secretary in the law firm of Mullin, Rhyne, Emmons and Topel, P.C., certify that on this 13th day of April, 1990, copies of the foregoing were mailed, postage prepaid, to the following:

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